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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. **731**

MARION LEE (Bill) IVEY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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UNITED STATES OF AMERICA, *Respondent*

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The petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on November 9, 1962, which approved a judgment of the United States District Court for the Eastern District of North Carolina.

OPINION BELOW

There was no opinion in the District Court. The opinion of the Court of Appeals (Bryan and Bell, Circuit Judges, and Hutcheson, District Judge), has not yet been reported. A copy is appended to this petition.

JURISDICTION

Jurisdiction to review this case upon a Writ of Certiorari is conferred upon this Court by 28 U.S.C. Section 1254(1). The judgment of the United States Court of Appeals to be reviewed was entered on November 9, 1962 (No. 8658). This petition is to be filed on or before January 8, 1963, the time for filing set forth in an extension of time ordered by Earl Warren, Chief Justice of the Supreme Court of the United States on December 10, 1962.

QUESTION PRESENTED

Did the Court of Appeals err in approving District Court's instruction on a statutory presumption so as to override defendant's presumption of innocence and the prosecution's burden to prove guilt beyond a reasonable doubt?

STATUTE INVOLVED

The chief statute involved is Section 5601(b)(1) of Title 26, U. S. Code, which provides criminal statutory presumption, and reads as follows:

"(b) *Presumptions.*

(1) *Unregistered stills.* . . . Whenever on trial for violation of subsection (a)(1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless defendant explains such presence to the satisfaction of the jury (or the Court when tried without jury)."

STATEMENT

The judgment of the Court of Appeals sought to be reviewed, affirmed a judgment convicting the petitioner of violating Sections 5179, 5180, 5601(a)(7) and 7206 (4) of Title 26, U. S. Code.

The defendant was indicted on four counts; the first charged defendant with having in his possession, custody and control an unregistered still; the second count charged that defendant worked at a distillery on which no sign had been placed showing it to be an unregistered distillery; the third count charged that defendant had made, and caused to be made, certain mash fit for distillation; and the fourth count that defendant had removed and concealed certain whiskey with intent to evade the tax imposed thereon. The jury found the defendant guilty upon all four counts.

The defendant appealed his conviction on the ground that the District Judge, Algernon L. Butler, erred in submitting to the jury without proper explanation the provisions of 26 U.S.C. Section 5601(b)(1), which is a criminal statutory presumption, reading as follows:

> "(b). *Presumptions.*
>
> (1) *Unregistered stills.* . . . Whenever on trial for violation of subsection (a)(1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless defendant explains such presence to the satisfaction of the jury (or the court when tried without jury)".

The Court of Appeals held, in effect, that the District Judge was not obligated to explain the statute.

its proper application or its effect on the fundamental rights of the accused in the instant case.

BASIS OF FEDERAL JURISDICTION

Federal jurisdiction in the court of first instance is based upon the fact that the crimes charged come properly within the provisions of 26 U.S.C. Sections 5179, 5180, 5601(a)(7) and 7206(4).

ARGUMENT

The Court of Appeals Erred in Approving Instruction of District Court Regarding Recently Enacted Statutory Presumption Which Failed to Safeguard Fundamental Rights of the Accused

Petitioner here complains that the instructions of the District Court clearly and patently deprived him of the safeguards guaranteed to an accused. The court, in attempting to apply a recently enacted statutory presumption in a criminal case, failed to explain the terms of the statute, its proper application to the facts and to caution the jury as to the protections with which an accused is clothed under fundamental laws of the United States.

The charge to the jury by the District Court in its paraphrasing of 26 U.S.C. 5601(b)(1) was as follows:

> "The law provides that whenever on trial for a violation of the law I just read you (26 U.S.C. Section 5179), the defendant is shown to have been at the site or place where and at the time when a still or distilling apparatus was set up without having been registered, such presence of a defendant shall be determined (sic) sufficient evidence to authorize his conviction unless the defendant explains such presence to the satisfaction of the jury." (R. p. 15) (By affidavit to Court of Appeals, the Court Reporter and U. S. Attorney

say the transcript is in error and that the word "determined" should be substituted for the word "deemed" in the above quoted portion of the charge.)

At the conclusion of the charge counsel for defendant excepted to the above portion of the charge:

> ". . . The defendant, Marion Lee Ivey, excepts to that portion of the charge which reads that a defendant by his mere presence at a distillery is presumed to have custody and control, ownership, et cetera. And the further qualification that standing unexplained without clearly indicating what "unexplained" means in that particular instance imposes too severe a burden on the defendant; particularly if that language is not followed by advising the jury that although there is this presumption, which the defendant again believes is erroneous, that it should be followed by advising the jury that this does not vitiate the presumption of innocense that follows any defendant throughout the trial of his case, that it is too severe an interpretation of the Statute or law or what it may be to say that the mere presence of one at a still, without saying how it can be explained or what "explained" may be, is too severe, especially if not followed by advising the jury at that particular juncture that that section of the instructions given or part of the charge is given, that this does not nullify the presumption of innocence and that they should not presume from the mere presence that the defendant is guilty as charged because he was seen at or near the still."

And the District Court, in the absence of the jury, answered this objection to the charge as follows:

> "The Court is of the opinion that its charge with respect to the presumption arising from the pres-

ence of a defendant at the site or place where and at the time when a distillation apparatus was set up without having been registered, is in accordance with the statute and the court is further of the opinion that the charge fully and adequately covered the presumption of innocence and the burden of proof and therefore the objections of the defendant are overruled." (R. pp. 23-24)

As the Court of Appeals fairly stated:

". . . The primary grievance of the appellant is that this instruction should not have been limited to the bald terms of the statute. In so curt a submission, he contends, the clause, 'such presence of the defendant shall be deemed sufficient evidence to authorize the conviction', largely negates both the presumption of the accused's innocence and virtually relieves the prosecution of the burden to prove guilt beyond a reasonable doubt. He argues that the Court was obligated to expound to the jury the statute's proper place in the case. The right of the jury, notwithstanding the statutory presumption, to consider and give effect to any evidence which might establish the lawfulness, or create doubt of the unlawfulness, of the defendant's presence at the still site, the appellant urges, should have been explained in the charge." (App. A)

The statutory presumption here dealt with [26 U.S.C. 5601(a)(1)] became effective in July, 1959. The alleged violation charged against this defendant occurred approximately two years thereafter in September, 1961. The statutory presumption is set forth in broad terms. Anyone *at* a place where a still is set up is presumed to be in possession and in control and working at an unregistered distillery and to have caused to be made mash fit for distillation and to have

removed and concealed certain whiskey with intent to evade the tax imposed thereon.

Most of the decided cases concerning criminal presumptions involve possession of stolen goods which the courts have held to be a common law inference growing out of experience. Another presumption that the court has on occasion considered is that concerning possession of narcotics. The possession of stolen goods inference has been strictly applied by the courts, *Bollenbach* v. *United States*, 326 U.S. 607, 90 L. Ed. 350, while courts have liberally applied the narcotics presumption in a number of instances.

The Court should further know that the guilt or innocence of this defendant of the offenses charged, while important, is nonetheless secondary in consideration of the principles of law here to be established.

The presumptions applicable to narcotic violations were authorized by statute in 1909. Those applicable to larceny and receiving find their origin in the common law. Proof in both types of prosecution is complicated by the minute and almost nebulous character of the offending article in the former instance and by the portability and mobility of those in the latter.

No one ever heard of a whiskey still which had commercial value and which was either minute or portable. Its existence and purpose can be proven by the government easily and without resort to presumption or other aids to proof afforded in narcotics or larceny cases. Also, it must be remembered that "presence" *at* a still site in logic and in equity need not "require" explanation to support acquittal when the word itself is so subject to interpretation and is so inexact in meaning. It is not in any way comparable to the word "possession" used in the narcotics statute or in the rule applied

in larceny cases, either in a physical or a legal sense. The word "at" is nowhere defined. If one works at a still there is no need for the presumption that one *at* a still is presumed to be working at a still. There is no attempt made by the statute to qualify what is meant by "at a still", nor was there any qualification placed on it in the instruction by the District Judge to the jury. On the other hand, the inference of possession or custody follows the common law inferences of constructive possession and there is no need for the statutory presumption.

So it can be said that where there is extreme difficulty of proof, the Courts have sustained the use of these presumptions when they are applied with precaution. When proof is easier and consistent in difficulty with that in other types of prosecution, the need to increase the protection of a defendant's constitutional guarantee of innocence becomes more acute. Presumptions in the abstract are legally supportable but a presumption which makes a defendant "talk" is not.

However, petitioner does not here argue the need or propriety of the criminal statutory presumptions with regard to unregistered stills. Petitioner's grievance is that the District Judge in his instructions to the jury failed to explain sufficiently the meaning and application of the statute. After stating the statutory presumption, the Court failed to admonish the jury as to the basic rights which clothe the accused throughout the trial. Although the various courts of appeal have stated that time has weakened the *Bollenbach* case, *supra*, the basic proposition therein stated remains good law. This Court there said:

> ". . . Legal presumptions involve subtle conceptions to which not even judges always bring clear

understanding . . . in view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether the guilt may be spelled out on the record, but whether guilt has been found by a jury according to the procedures and standards appropriate for criminal trials in the federal courts."

"Accordingly, we cannot treat the manifest misdirection in the circumstances of this case as one of those 'technical errors' which 'do not affect the substantial rights of the parties' and must therefore be disregarded. . . . All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished. The 'technical errors' against which Congress protected jury verdicts are of the kind which led some judges to trivialize law by giving all legal prescriptions equal poteney. . . . Deviations from formal correctness do not touch the substance of the standards by which guilt is determined in our courts, and it is these that Congress rendered harmless. . . . From presuming too often all errors to be 'prejudicial', the judicial pendulum need not swing to presuming all errors to be so 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however, justifiably engendered by their record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

Justice Black's dissent does not run contrary to the objection which this petitioner makes to the instruction of the District Court here. Not only did the Dis-

trict Court fail to explain the presumption and the application of the presumption to the facts in the case, but it made no attempt at that juncture in the charge to caution the jury *not* to strip away the presumption of innocence that goes with the accused and his constitutional right not to take the stand. While it is true that at the outset of the charge the District Court perfunctorily instructed the jury as to the presumption of innocence and the right not to take the stand, it was not until after a recitation of the facts and contentions that he attempted to instruct the jury with regard to the statutory presumption. No further allusion was made to these fundamental safeguards. And, quite differently from other reported decisions which have made pointed reference to the fact that a particular portion of the charge was unchallenged, including Justice Black's dissent in the *Bollenbach* case, counsel for petitioner requested that the Court amplify its explanation and application of the statutory presumption in question. (R. p. 23) And, further, although no evidence was presented by the defendant, as stressed by Justice Frankfurter in the *Bollenbach* case, the jury retired at 4:10 P.M. on a Friday afternoon and returned to the courtroom for further instructions at 5:53 P.M., and after receiving further instructions and a copy of the Bill of Indictment did not render a verdict until 6:27 P.M. (R. pp. 23, 24, & 26) Of course it would only be conjectural as to whether they were confused by the instruction of the court, but Justice Frankfurter in the *Bollenbach* case thought the time interval and the request for further instructions to be significant. In the light of the fact that the defendant did not put on any evidence, we believe it to be significant in the instant case.

The Court of Appeals was evidently concerned with the charge of the District Court. It is interesting to note the language in which Judge Bryan set forth what he conceived to be a proper charge in the instant case. While holding that there was no error, Judge Bryan said:

> "It would have been preferable we think for the Court to have enlarged upon the effect of the statute. Cf. Bray v. United States, 306 F. 2d 743, 746, 748 (D.C. Cir. 1962); Bates v. United States, 219 F. 2d 30, 33, (D.C. Cir.), cert. denied, 349 U.S. 961 (1955). The statute, the jury *would* be instructed, simply declares that an additional effect and weight shall be given to evidence proving that the defendant was present at the still; it authorizes the jury to consider such evidence as sufficient to convict the accused in the absence of an explanation of his presence there. An admonition *would* be added that the declaration of the statute was subject to rebuttal. The jury *would* then be told they had the right to accept or reject the authorization of the statute, as they saw fit, in ascertaining whether the accused was an actor in the venture or simply an innocent bystander. The Court *would* properly say that if the jury believed beyond a reasonable doubt from the force of the statute alone, or together with supplementing evidence, that the defendant was guilty, they should convict him. However, they *would* have to be cautioned that in making this determination they must remember that the statute does not erase the initial presumption of innocence or the Government's burden to prove the accused guilty beyond a reasonable doubt. But, the Court *would* continue, if after considering the statute and the evidence, including any evidence tending to explain the presence of the accused at the still, the jury had a reasonable doubt of his guilt, they must acquit. Explanation of his presence at the still need not come

> from the defendant personally, the charge *should* note, but might appear from the circumstances proved or the testimony of other persons." (Emphasis supplied) (App. A, pp. 4 and 5)

Thus, Judge Bryan did not say that the District Court "should" have charged the above (except in the last instance) nor does he weaken his admonition to the lower court that it "could" have charged the above, but uses the word "would". In any event, it would appear from the decision that Judge Bryan was satisfied from the facts, although no transcript of evidence was forwarded to the Court, that the defendant was guilty as charged. (App. p. 6) While Judge Bryan's judgment may be correct in this instance, the Court of Appeals by its decision has now held proper a District Court's charge on a criminal statutory presumption *without explanation*. Although Judge Bryan may find the facts in this case, without considering the presumption, show the defendant to be guilty, he has established a precedent which will strip from future accuseds fundamental protections of the law. The hunter in the woods, the naturalist, the next-door neighbor are all subject to being "at" a still and, under the opinion quoted from the Circuit Court, a presumption will arise that they are the owners of the still and have worked the still. Yes, it may be explained, but that will go to the credibility of the accused. If, as in the instant case, the presumption of innocence is stated at the outset of the charge and the presumption of ownership and operation is stated after all the contentions, without the safeguards which Judge Bryan stated the jury "would" be instructed concerning, that charge under the opinion of the Court of Appeals is the law of this case at the present time.

Petitioner contends that this newly enacted statutory presumption which has not been previously construed involves principles of importance to the public which should be settled. The Court of Appeals has sanctioned such a departure by the lower court from accepted procedure so as to call for the exercise by the Supreme Court of its power of supervision.

As pointed out above, the particular statute in question, 26 U.S.C. 5601(a)(1), has not been construed by any federal court. However, the reasoning followed by the Court of Appeals for the Fourth Circuit in the instant case is at variance with other circuits. It is the contention of petitioner that the District Court's instructions to the jury concerning legal presumptions are at a variance with those approved in other Courts of Appeal.

The *Bollenbach* case, *supra*, affords the springboard for most of these Courts of Appeal decisions. As stated by United States Court of Appeals of the District of Columbia in *Bray* v. *United States*, 306 F. 2d 743 (1962):

> "On its face, Bollenbach would appear to condemn the charge attacked here. But time has not treated the Bollenbach decision kindly. Repeatedly, courts of appeals have sustained similar instructions in the face of vigorous protests based upon Bollenbach. See, e.g., *Battaglia* v. *United States*, 205 F. 2d 824 (4th Cir., 1953); *Prince* v. *United States*, 217 F. 2d 838 (6th Cir., 1961); *Morandy* v. *United States*, 170 F. 2d 5 (9th Cir., 1948), cert. denied 336 U.S. 938, 69 S. Ct. 741, 93 L. Ed. 1097 (1949). And the Supreme Court has done nothing to disturb the interment of its decision. Hence Bollenbach's vitality is doubtful, to say the least."

In the *Bray* case, which involved transportation of a stolen vehicle, the appellant complained of the following instruction:

> "There is another principle of law which you have for your consideration in this case and that is the principle known as possession of recently stolen goods. If you find that this defendant was in possession of this automobile, Lincoln Continental, and that that vehicle had been recently stolen, and it had been stolen in North Carolina, and you further find it to be in the District of Columbia, and you further find that it was in fact being driven by this defendant, then you may, if you see fit to do so, *infer* therefrom that this defendant is guilty of the offense with which he is charged, unless you find that he has explained to your satisfaction his possession of the vehicle in question on the date in question and under the circumstances stated. *The Court states to you that you are not required to so infer from the facts, but you may infer unless he has explained, or the defense has explained to your satisfaction his possession in the District of Columbia on the date in question.*
>
> "Now there is another principle of law. You are not to infer any guilt on the part of the defendant by failure of the defendant to take the stand. He is not required to take the stand." (Emphasis supplied)

Later in the decision the Court said:

> "Here the trial court did not instruct the jury that there was a presumption that one in possession of recently stolen goods was the thief. Rather, it said '*you may if you see fit to do so infer* . . . that this defendant is guilty unless you find that he has explained . . . his possession of the (stolen vehicle).' (Emphasis supplied.) We think this did

not mislead the jury into believing that it was required to infer guilt from possession.

"Appellant also contends that the instruction erroneously placed the burden of explaining possession upon him. But the jury was not told to draw the inference *unless* appellant had failed to explain how he acquired the car. Rather, the instruction properly noted that, although appellant's guilt *might* be inferred from his possession of the stolen car, the jury could not draw such an inference if he had satisfactorily explained his possession. *Moreover, immediately after explaining the inference based upon possession, the instruction went on to state that the jury should not infer guilt from appellant's failure to take the stand. We think that, fairly read, the instruction did not place the burden of explaining possession upon appellant.*" (Emphasis supplied)

It seems clear that the *Bray* case is at odds with the opinion by Judge Bryan in the instant case. The trial judge in the *Bray* case very carefully explained the meaning of the presumption and its proper application. Further, the Court used the terminology "may" or "might" infer guilt, but never stated that the facts would be "deemed sufficient" for a finding of guilt.

Petitioner would also like to emphasize at this point that the presumption arising from possession of stolen property has its origination in common experience over a long period of time so as to become a part of our common law. In the instant case we are dealing with a statutory presumption and one which has existed only a few years. But—and this is the crux of the matter—the trial judge in the instant case paraphrased the statutory presumption and immediately set about to set forth the counts in the indictment. In the *Bray* case, *supra*, the trial court carefully instructed the jury

concerning the age old presumption of permitting the jury to draw an inference from possession of stolen property *and* immediately followed the instruction with the admonition that the jury should not infer guilt from the appellant's failure to take the stand.

As Judge Brown said in a concurring opinion in *Barfield* v. *United States*, 229 F. 2d 936, 942:

> "I think it important to emphasize that what we are saying is but another instance of the familiar but fundamental concept that a Federal Trial Judge at all times, in all stages of the trial, must make certain that a naked legal rule has factual relevance, and *its application is surrounded with continuous safeguards.*" (Emphasis supplied)
>
> ". . . Indeed, this case now serves as a classic example of the risk to liberty when a person may stand convicted *unless* he brings forward a convincing explanation."
>
> "It is the classic application of the constitutional presumption of innocence, made here and by all careful trial judges, that the presumption of innocence attends the defendant at all times and at all stages—does not, and cannot, ever leave or abandon him."

The judge's charge in the instant case does not afford the protection to the defendant required under the decisions in other circuits and appears to be at odds with a case decided by the Fourth Circuit in 1953 in which the Court approved a District Court's instruction that strikingly protected the rights of the accused. In *Battaglia* v. *United States*, 205 F. 2d 824, the Court of Appeals quotes the charge of the lower court to the jury as follows:

> "Now, I charge you, gentlemen of the jury, that the mere fact that the defendant was found in

> possessions of this stolen car three days after it was stolen in Brooklyn does not raise any presumption that he stole it or that he transported it but it is a circumstance for you to consider along with all the other circumstances with the idea of finding what the truth about it is; there is no presumption which arises from the mere possession of the stolen automobile but the law is that the possession of the fruits of a crime recently after its commission—in this case three days afterward in the possession of the automobile in question—in the absence of an explanation justifying its possession warrants an inference pointing toward guilt and that is the extent of it, it warrants an inference pointing toward guilt."

And the Court went on to charge the jury concerning the innocence of the accused and the burden of proof.

This case does not fall in the category of the United States Supreme Court cases which have discussed the statutory presumption concerning possession of narcotics. See *Yee Hem* v. *United States*, 1925, 268 U.S. 178, 45 S. Ct. 470, 69 L. Ed. 904; *Casey* v. *United States*, 1928, 276 U.S. 413, 418, 48 S. Ct. 373, 72 L. Ed. 632. These cases establish the constitutionality of the presumption statutes in criminal matters. Petitioner does not argue this point.

Petitioner merely says that the trial court abandoned the protections to which the accused was entitled and, as the Court of Appeals stated, curtly charged that presence "at" a still site was deemed sufficient for the jury to find defendant guilty of ownership, working at a distillery, making mash and concealing non-tax paid alcohol. And, as Judge Brown in *Barfield* case, *supra*, stated:

> "I think it important to emphasize that what we are saying is but another instance of the familiar

but fundamental concept that a Federal Trial Judge at all times, in all stages of the trial, must make certain that a naked legal rule has factual relevance, and its application is surrounded with continuous safeguards." "Indeed, this case now serves as a classic example of the risk to liberty when a person may stand convicted *unless* he brings forward a convincing explanation."

CONCLUSION

For the foregoing reasons, this petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8658

UNITED STATES OF AMERICA, *Appellee*,

v.

MARION LEE IVEY, *Appellant*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT RALEIGH, ALGERNON L. BUTLER, DISTRICT JUDGE.

(Argued October 3, 1962. Decided November 9, 1962.)

Before BRYAN and BELL, Circuit Judges, and HUTCHESON, District Judge.

D. K. Stewart, and Maupin, Broughton, Taylor & Ellis on brief for Appellant, and William L. Hill, II, Assistant United States Attorney, (Robert H. Cowen, United States Attorney, on brief) for Appellee.

ALBERT V. BRYAN, Circuit Judge:

In this illicit still case Marion Lee Ivey appeals his conviction on the ground that the District Court erred in its charge to the jury in respect to the submission of the provisions of 26 U.S.C. § 5601(b)(1), reading as follows:

"(b) *Presumptions.*—

(1) *Unregistered stills.*—Whenever on trial for violation of subsection (a) (1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence

to the satisfaction of the jury (or of the court when tried without jury)."

The defendant had been indicted on four counts. The first stated the offense—embraced in subsection (a)(1) referred to in the statute just quoted—of having in his possession, custody and control an unregistered still, 26 U.S.C. § 5179. The remaining counts charged, in this order, that Ivey had worked at a distillery on which no sign had been placed showing it to be a registered distillery, 26 U.S.C. § 5180; that he had made, and caused to be made, certain mash fit for distillation, 26 U.S.C. § 5601(a)(7); and that he had removed and concealed certain whiskey with intent to evade the tax imposed thereon, 26 U.S.C. § 7206(4). The jury found against the accused on all counts.

The defendant Ivey offered no evidence, but his plea of not guilty, of course, denied his participation in the unlawful undertaking. The officers testified they observed him taking part in the enterprise. On this conflict the Court charged under the first count as follows:

"The law provides that whenever on trial or for violation of the law I have just read you, the defendant is shown to have been at the site or place where and at the time when a still or distilling apparatus was set up without having been registered, such presence of a defendant shall be determined [sic] sufficient evidence to authorize his conviction unless the defendant explains such presence to the satisfaction of the jury."

Later, on the same count, the District Judge stated to the jury:

"If you find from the evidence beyond a reasonable doubt that the defendant was at the site or place where and at the time when the still or distillery apparatus described in the indictment was located, such presence

of the defendant is sufficient evidence for you to convict the defendant unless the defendant explains such presence to your satisfaction."

While he might have charged similarly in respect to Count 3, he did not do so.

Primarily, the grievance of the appellant is that this instruction should not have been limited to the bald terms of the statute. In so curt a submission, he contends, the clause, "such presence of the defendant shall be deemed sufficient evidence to authorize the conviction", largely negates both the presumption of the accused's innocence and the prosecution's burden to prove guilt beyond a reasonable doubt. He argues that the Court was obligated to expound to the jury the statute's proper place in the case. The right of the jury, notwithstanding the statutory presumption, to consider and give effect to any evidence which might establish the lawfulness, or create doubt of the unlawfulness, of the defendant's presence at the still site, the appellant urges, should have been explained in the charge.

It would have been preferable, we think, for the Court to have enlarged upon the effect of the statute. *Cf.* Bray v. United States, 306 F. 2d 743, 746, 748 (D.C. Cir. 1962); Bates v. United States, 219 F. 2d 30, 33 (D.C. Cir.), *cert. denied*, 349 U.S. 961 (1955). The statute, the jury would be instructed, simply declares than an additional effect and weight shall be given to evidence proving that the defendant was present at the still: it authorizes the jury to consider such evidence as sufficient to convict the accused in the absence of an explanation of his presence there. An admonition would be added that the declaration of the statute was subject to rebuttal. The jury would then be told they had the right to accept or reject the authorization of the statute, as they saw fit, in ascertaining whether the accused was an actor in the venture or simply an innocent

bystander. The Court would properly say that if the jury believed beyond a reasonable doubt from the force of the statute alone, or together with supplementing evidence, that the defendant was guilty, they should convict him. However, they would have to be cautioned that in making this determination they must remember that the statute does not erase the initial presumption of innocence or the Government's burden to prove the accused guilty beyond a reasonable doubt. But, the Court would continue, if after considering the statute and the evidence, including any evidence tending to explain the presence of the accused at the still, the jury had a reasonable doubt of his guilt, they must acquit. Explanation of his presence at the still need not come from the defendant personally, the charge should note, but might appear from the circumstances proved or the testimony of other persons.

However, instantly the Court does not feel that the failure of the District Judge to amplify his charge was reversible error. Previously he had painstakingly defined each of the offenses, emphasizing that every element of the crime had to be proved beyond a reasonable doubt before conviction could follow. Repeatedly he recalled to the jury the presumption of innocence and the necessity that they be satisfied beyond a reasonable doubt before finding guilt in any instance. He warned them that no duty rested upon the defendant to disprove the indictment. The defendant's omission to testify, he instructed, carried no unfavorable inference whatsoever. *Cf.* Smith v. United States, 273 F. 2d 462, 466 (10th Cir. 1959), *cert. denied*, 363 U.S. 846 (1960); Maynard v. United States, 215 F. 2d 336, 338-341 (D.C. Cir. 1954). *But see* United States v. Hernandez, 290 F. 2d 86, 90 (2d Cir. 1961).

The point is made by the appellant that in giving the statute to the jury, the District Judge used the word "determined" instead of the statute's verb "deemed", in that part of the statute declaring the defendant's presence suffi-

cient to authorize conviction. According to the United States Attorney and the affidavit of the Official Court Reporter the transcript is in error in showing that "determined" rather than "deemed" was used in the charge. If essential, any such difference between the parties as to the record would be settled by the District Court on remand for that purpose. F.R.Crim.P. 39(b); F.R.Civ.P. 75(h). But we do not believe the discrepancy vital or the jury mislead even if "determined" was used in the charge.

A fair trial, we think, was accorded the appellant, and a verdict of guilty was inescapable under the evidence. We affirm the conviction.

Affirmed.

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674680—63

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 731

MARION LEE (BILL) IVEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 44–49;[1] Pet. App. 1–5) is reported at 310 F. 2d 227.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1962 (R. 50). On December 9, 1962, the Chief Justice extended the time for the filing of a petition for a writ of certiorari to and including January 9, 1963. The petition was filed on January 8, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] R. 1 consists of the typewritten appendix to the brief of appellant below and is separately paginated 1 to 26. References to pp. 1-26 herein are not to this appendix but to the record pagination which follows the typewritten appendix.

QUESTION PRESENTED

Whether the instructions to the jury were insufficient because not rephrased as requested by petitioner.

STATUTES INVOLVED

Internal Revenue Code of 1954, as amended by Pub. L. 85–859, Title II, Sec. 201, 72 Stat. 1398 (26 U.S.C. 5601):

> (a) *Offenses.*
>
> Any person who—
>
> (1) *Unregistered stills.*—has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179(a) * * *
>
> * * * * * *
>
> shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense.
>
> (b) *Presumptions.*—
>
> (1) *Unregistered stills.*—whenever on trial for violation of subsection (a) (1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).
>
> * * * * * *

STATEMENT

Petitioner was indicted in the United States District Court for the Eastern District of North Carolina on four counts charging the following liquor violations: (1) possession, custody, and control of an unregistered still; (2) working at a distillery at which the required sign had not been posted; (3) making or fermenting 4,000 gallons of mash fit for distillation; and (4) removing, depositing, or concealing 41 gallons of whiskey on which no tax had been paid (R. 4–5).

At the trial, officers testified for the government that they observed petitioner at the site of the still (located 200 yards from petitioner's residence, R. 16), caulking cracks in the condenser box (R. 13); that petitioner fled when the officers approached and called him (R. 14–15); and that, when apprehended, he declined to offer any explanation (R. 15). The defense presented no evidence at the trial (R. 46).

The trial judge instructed the jury on the presumption of innocence and the necessity that the government prove guilt beyond a reasonable doubt, saying, *inter alia:*

> A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence. Since the burden is upon the United States to prove the defendant guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon the failure of the prosecution to establish such proof.
>
> A defendant may also rely upon evidence brought out on cross examination of witnesses for the prosecution.

> The law does not impose upon the defendant the duty of producing any evidence [R. 11–12].

With respect to the requirement, under the first count, that the government prove petitioner's possession, custody, or control of an unlawful still, the court said, *inter alia:*

> A person who although not in actual possession, knowingly has the power at a given time to exercise dominion or control over a thing is then in constructive possession of it. [R. 19]
>
> * * * * *
>
> If you find from the evidence beyond a reasonable doubt that the defendant Marion Lee Ivey, either alone or jointly with others, had actual or constructive possession on the 11th day of September, 1961, of the still set up described in the first count of the indictment, then you may find that such still set up was in the possession of the defendant Marion Lee Ivey within the meaning of the word possession as used in these instructions.
>
> If you find from the evidence beyond a reasonable doubt that the defendant was at the site or place where and at the time when the still or distillery apparatus described in the indictment was located, such presence of the defendant is sufficient evidence for you to convict the defendant unless the defendant explains such presence to your satisfaction [R. 19].

In discussing the remaining three counts, the court omitted any reference to the permissibility of inferring guilt from petitioner's presence at the still. He instructed the jury that it might find the defendant guilty or not guilty as to each count under which he

was charged. Counsel for petitioner objected as follows to the instruction under Count 1 (R. 25–26):

> The defendant, Marion Lee Ivey, excepts to that portion of the charge which reads that a defendant by his mere presence at a distillery is presumed to have custody and control, ownership, et cetera. And the further qualification that that standing unexplained without clearly indicating what unexplained means in that particular instance imposes too severe a burden on the defendant, particularly if that language is not followed by advising the jury that although there is this presumption, which the defendant again believes is erroneous, that it should be followed by advising the jury that this does not vitiate the presumption of innocence that follows any defendant throughout the trial of his case, that it is too severe an interpretation of the Statute or law or what it may be to say that the mere presence of one at a still, without saying how it can be explained or what explained may be, is too severe, especially if not followed by advising the jury at that particular juncture that that section of the instructions given or part of the charge is given, that this does not nullify the presumption of innocence and that they should not presume from the mere presence that the defendant is guilty as charged because he was seen at or near the still.

The court overruled this objection (R. 26). Upon the jury's verdict of guilty on all counts, the court imposed concurrent sentences of three years on Counts 1 and 3 and concurrent sentences of one year and two years, respectively, on Counts 2 and 4, to commence at the end of the three-year sentences. However, the

sentences on Counts 2 and 4 were suspended and petitioner placed on five years' probation (R. 6).

ARGUMENT

1. Since petitioner's sentence of three years on the challenged conviction under Count 1 runs concurrently with the sentence on the unchallenged conviction under Count 3, the judgment is sustainable upon Count 3 alone. *Claassen* v. *United States*, 142 U.S. 140, 146–147; *Evans* v. *United States*, 153 U.S. 608, 609; *Pierce* v. *United States*, 252 U.S. 239, 252; *Brooks* v. *United States*, 267 U.S. 432, 441; *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Pinkerton* v. *United States*, 328 U.S. 640, 641–642, fn. 1; *United States* v. *Sheridan*, 329 U.S. 379, 381; *Lawn* v. *United States*, 355 U.S. 339, 359.

2. In any event, petitioner's objection to the instruction on Count 1 is without merit. He does not in this Court contest the validity of Section 5601 (b)(1), which provides that the presence of a defendant at the site of an unregistered still, unless explained, will permit the jury to convict him of illegally possessing the still (Pet. 8, 17). Rather, the gravamen of his complaint is that the trial judge refused to repeat at the end of the charge the instruction given at the outset with respect to the presumption of innocence. He contends that the trial court should have told the jury in so many words that it was *permitted* to draw an inference of guilt from the fact of petitioner's presence at the still but was not *required* to do so; and that, despite such presence, the govern-

ment still had the burden of proving guilt beyond a reasonable doubt.

It is clear, however, that while the judge did not use the precise phraseology requested by petitioner, his instruction—couched in the language of the statute—adequately conveyed the same substance. It charged that petitioner's presence at the still would be "sufficient" evidence to "authorize" conviction unless explained to the jury's satisfaction (R. 18). Later in the instruction (in a portion not quoted in petitioner's brief (Pet. 4–5)), the court adverted three times to the necessity that the government prove its case beyond a "reasonable doubt" (R. 19–20) and again described the evidence of presence at the still merely as "sufficient," not conclusive (R. 19). These admonitions, we submit, together with the initial instruction as to the presumption of innocence, adequately apprised the jury of the proper legal standard. The failure of the judge to amplify the charge in the manner requested was not error, much less reversible error.

We would point out, moreover, that in this case the Government's unrebutted evidence went beyond the minimum which the statute deems sufficient to warrant conviction. The testimony disclosed that petitioner was not only present at the still, but was actually working on it; that he fled at the approach of the officers; and that, when apprehended, he offered no explanation whatever. Under these circumstances, it is difficult to see how the jury could have reached any verdict other than the one it did.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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